NO. 16366

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN L. OWEN,

Appellant,

v.

SEARS, ROEBUCK AND COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 4-59

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JURISDICTIONAL STATEMENT

This is an appeal by John L. Owen, plaintiff below, from a judgment entered by the United States District Court for the District of Oregon by direction for the defendant below (Tr. of Record 15).

The action below was commenced by a complaint filed by John L. Owen claiming damages in the sum of $40,000.00 against Sears, Roebuck and Company, a corporation, for the breach of an implied warranty, by reason of which John L. Owen was permanently injured

(Tr. of Record 4-5). The plaintiff below was a citizen of the State of Oregon and the defendant below was a citizen of the State of New York (Tr. of Record 7).

The United States District Court for the District of Oregon had jurisdiction of this cause by virtue of USCA Title 28, Sec. 1332.

This Court has jurisdiction of this cause by virtue of USCA Title 28, Secs. 1291 and 1294.

STATEMENT OF THE CASE

On July 15, 1955, the appellant was wearing a sports shirt which had been purchased by his wife from the appellee. The shirt was of the pullover variety with short sleeves and two buttons at the neck. The shirt had been purchased about May of 1955 and had prior to the day in question been kept in a dresser drawer at home with other wearing apparel of the appellant. It was a cotton shirt and had a polished finish (Tr. 4-6).

On the day in question, the appellant's wife was working outside the home and the appellant was home, it being a Saturday, taking care of their children and doing light housework. He had completed the housework, took a bath and, in putting on clean clothes, chose the shirt in question.

The appellant sat down on the davenport and lighted a cigarette. It was a warm day and there was a breeze blowing through an open window immediately in front of the davenport upon which appellant was sitting. The appellant took a puff or two of the cigar-

ette and the shirt burst into flames, either because of contact with the match or the cigarette (Tr. 30). The appellant rushed to the bathroom while attempting to tear the shirt from his body. By the time the shirt was ripped off and the flames stomped out, there was nothing remaining of the shirt except the collar. Part of the shirt had stuck to his back and was still burning when he reached the bathroom. Appellant was also wearing an undershirt (T shirt) which likewise burned (Tr. 27). Appellant received burns upon his right chest and right underarm, as well as along his back. He put on another shirt, called a neighbor to care for his children and immediately sought medical attention (Tr. 8-10).

Appellant was confined to a hospital for a period of about three weeks, during which time he was given sedatives frequently for pain. After being discharged from the hospital, appellant was visited regularly by his doctor who would change the bandages and treat an infection which developed from the burns (Tr. 15-14). Scars from the burns were present and visible at the time of trial (Tr. 18).

Appellant's wife was an employee of appellee and she purchased the shirt in question from the appellee sometime in May of 1955. It was a cash sale and was purchased from the men's section of the department store (Tr. 40-45). She was not certain of the trade name of the garment, but she testified that it had a polished finish (Tr. 40-41). After she purchased the shirt, she put it in a drawer with the rest of his clothing. Appellant had not worn it before the day in question, nor had it been cleaned by appellant or anyone else. She testified

that she believes the original pins were still in the shirt up to the day of the accident (Tr. 44). All that remained of the shirt was a collar which was found in the bathroom the evening of the fire and which was thrown in the garbage (Tr. 45).

As noted above, appellant's wife purchased the shirt from the respondent because she was able to obtain an employee's discount. She personally purchased most of appellant's clothes at Sears for that reason, and she was so authorized to do by the appellant (Tr. 46, 58, 72). The garment in question was cotton, light in weight and had a smooth, glossy finish (Tr. 46).

Dr. David C. Frisch, a dermatologist, testified that he examined the appellant on the 17th day of April, 1958, for burn scars on the right side of his chest and right arm. Five by five inch scars were present on his upper arm, and on his lower arm they were of a size of about six by seven inches. They were superficial second degree and deep second degree burns and they were permanent (Tr. 51). Appellant suffered discomfort because of his inability to prespire in the scarred area and his discomfiture was likewise of a permanent nature (Tr. 55).

STATEMENT OF POINTS

1. There was substantial evidence presented in the trial of this cause from which the jury could find that the respondent sold a garment which was not reasonably fit for the purpose intended.

2. There was substantial evidence presented from which the jury could find that the garment in question was sold by the appellee to the appellant.

3. Any requirement of notice of breach of warranty under the Uniform Sales Act (Oregon Revised Statutes 75.490) was satisfied by the appellant.

4. The appellee waived any requirement of notice of breach of warranty under the Uniform Sales Act (Oregon Revised Statutes 75.490).

Point I

There was substantial evidence presented from which the jury could find that the appellee sold a garment which was not reasonably fit for the purpose intended.

Barrett v. S. S. Kresge Co., 31 Pa D & C 379;
Blessington v. McCrory Stores Corporation, et al, 305 NY 140, 111 NE 2d 421, 37 ALR 2d 698;
Deffebach v. Lansburgh & Bro., 80 App D C 185, 168 ALR 1052, 150 F2d 591;
Jelleff, Inc. v. Branden, 233 F2d 671;
Lohse v. Coffey, 32 A2d 258, 261;
Ringstad, et ux, v. I. Magnin & Co (1952), 39 Wash 2d 923, 239 P2d 848;
Uniform Sales Act (ORS 75.150(1));
Uniform Sales Act, (ORS 75.490).

ARGUMENT

At the conclusion of appellant's case, the trial court, in granting appellee's motion for a directed verdict stated:

> "Now, the question is here we are dealing purely with a breach of contract. The plaintiff's evidence is that the garment was purchased from the defendant. The evidence then shows that in the course of

> lighting the cigarette his shirt burned. I see absolutely nothing that shows that the garment was not constructed, did not represent all that it was warranted to be. So, I am forced to grant the motion."

The evidence is undisputed that the shirt being worn by the appellant burst into flames while he was lighting a cigarette and he was badly burned before he could tear the garment from his body (Tr. 9-10). Nothing remained of the shirt except the collar which was thrown into the garbage can by appellant's wife (Tr. 18). This being so, the court's holding was either a declaration that shirts commonly are made of material or treated with a substance which causes them to react as this garment did when coming into proximity with an open flame or the glow of a cigarette; or, was a finding as a matter of law that the appellant's testimony was completely unworthy of belief in the absence of proof of the construction of the garment and the manner in which it was treated. Neither position is tenable.

The Uniform Sales Act (Oregon Revised Statutes 75.150 (1)) provides:

> "Where the buyer, expressly or by implication, makes known to the Seller that particular purpose for which the goods are required, and it appears that the buyer relies on the Seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The case of *Deffebach v. Lansburgh & Br.*, 80 App D C 185, 168 ALR 1052, 150 F2d 591, leaves little doubt as to the inferences that may be drawn from testimony present in the instant case. The Deffebach

case was one where a chenille lounging robe was purchased from appellee's store. About the third or fourth time she wore it she was badly burned. The undisputed testimony was that she waived or "fanned" a match after lighting a cigarette, that the robe caught fire, and that the flame spread with great rapidity, "quicker than you snap your fingers almost," in spite of immediate and vigorous efforts of several persons to put it out. On appeal, it was conceded that the only question in the case was whether or not the garment was reasonably fit for use as a robe. The Court said:

> "Since outer garments intended for domestic wear are not unlikely to come into momentary contact with lighted matches, tobacco, or stoves, it seems to us clear that a robe which, when this contact occurs, instantly bursts into flame and inflicts severe injury is unreasonably dangerous and unfit for use. Accordingly, we think the jury should have been instructed that if the robe caught fire and burned as the witness testified, there was a breach of appellee's implied warranty of fitness." (Reversed).

In *Jelleff, Inc. v. Branden,* 233 F2d 671, the appellee purchased a finger-tip or hip length "brunch" coat or smock from the appellant. She wore the garment only two or three times. On the day in question, she was preparing a meal and the smock came into contact with the outer ring or rings of the burner on her electric stove. The smock was buttoned down the front but hung in a flaring fashion. She first noticed the smock was afire when the flames reached her chest. The flames spread rapidly through the right half of the garment and, as she ran from the kitchen to the bathroom, various charred portions of the garment fell to the floor

and burned spots in the rug. Part of the garment fell into the tub and was thrown out by the janitor. The garment burned with such intensity that it melted or fused a buckle and the strap on her brassiere and burned the imprint of the strap into her back. "It went so fast that I couldn't get the canister down in time to bring down my arm to protect myself." The Court cited with approval their holding in the Deffebach case and, in affirming the verdict for plaintiff, held that the jury was justified in inferring that the garment was not reasonably suited for the purpose it was obviously intended.

Also see *Ringstad et ux v. I Magnin & Co.* (1952), 39 Wash 2d 923, 239 P2d 848; *Blessington v. McCrory Stores Corporation, et al,* 305 NY 140, 11 NE 2d 421, 37 ALR 2d 698.

The cases cited are squarely in point. The Deffebach case teaches us that if the garment comes into "momentary contact" with a lighted match or cigarette and it "bursts into flames," a jury would be justified in finding that the seller had breached his implied warranty of fitness. That case does not require the appellant to go further and establish by direct evidence the construction of the garment, if, and how, it may have been treated chemically, and its propensities when exposed to heat. Indeed, as in the Jelleff case, supra, the appellant could not have done so as the garment was completely destroyed by the flames, with the exception of the collar which was thrown out in the garbage.

As was said in *Lohse v. Coffey,* 32 A2d 258, 261:

"Here, where the claim rests upon the implied warranty, plaintiff needed to prove (as we have pointed out above) only that he suffered an injury as a result of a breach of such warranty; in other words, his case was easier to prove. For the purpose of this discussion there can be no question that he proved the injury. But did he prove the first element in the case—that the food was tainted? The fact that Monarch, who ate the same solids also became ill was evidence of such taint. His physicians testimony that if the food was tainted it 'was a competent producing cause' of the trouble, was also clearly acceptable proof. The two taken together supply a firm footing for the verdict. Nor is this basing inference upon inference, for the only element not proven factually (or by opinion evidence) was that the food was tainted. This the jury was entitled to infer from the other evidence.

"We do not say that plaintiff made out a perfect, unassailable case, or one which was proven to a scientific demonstration. Nor was he required to do so in order to get to the jury.

"Only the most litigious plaintiff would have had the presence of mind, in the throes of intermittent attacks of vomiting and diarrhea to arrange for laboratory tests and chemical analyses of his vomitus and excreta to be brought into court to prove his case. A man can hardly be expected to prepare a lawsuit while writhing on an ambulance strecher or a hospital bed."

Obviously, the appellee in the instant case was in a much better position to know the type of garment it was retailing to the general public. This the trial court apparently recognized but ignored (Tr. 94). As was said in *Barrett v. S. S. Kresge Co.,* 31 Pa D & C 379, where the court held an implied warranty was present in the purchase of a dress which was impregnated with dye:

"We see no distinction in reasoning or principle between the present situation and the foodstuff cases, universally recognized as the subject of implied warranties of fitness for use for the purpose for which the materials or products are sold. Here are cheap garments manufactured and sold in lots of thousands. The manufacturer and retailers are obviously the only ones in a position to control and know the character and effect of the materials used in their manufacture, and no housewife can be expected to risk the chance of poisoning by a substance contained in an ordinary article of clothing designed and sold expressly for human wear."

Point II

There was substantial evidence presented from which the jury could find that the garment was sold by the appellee to the appellant.

Davis v. Van Camp Packing Co., 176 NW 382, 17 ALR 649;
Klein v. Duchess Sandwich Co., 14 Cal 2d 272, 933 P2d 799;
Shysky v. Drake Brothers Co., 192 App Div 186, 182 NY Supp 459;
ORS 75.150 (1);
Restatement, Agency, Vol I, Sec. 20;
Restatement, Agency, Vol I, Sec. 22.

ARGUMENT

A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person. Restatement, Agency, Vol I, Sec. 20. A husband or wife may be authorized to act for the other party to the marital relationship. Restatement, Agency, Vol I, Sec. 22.

Thus, in the leading case of *Davis v. Van Camp Packing Co.,* 176 NW 382, 17 ALR 649, where an ultimate consumer was poisoned by eating canned pork and beans which he had burchased from a retailer who had bought the same from a jobber to whom the manufacturer had sold them, it was held that the manufacturer could be held liable upon the theory of implied warranty of wholesomeness, notwithstanding there was no privity of contract between the consumer and manufacturer. In reaching this conclusion the Court pointed out that manufacturers of food, especially of canned food, must exercise the highest degree of care; that the better rule is that the production and sale of an article of food carries an implied warranty that it is fit for human consumption, except, perhaps, where the contrary is observable; and, upon the question of implied warranty, the question as to privity as not controlling. (Accord: *Shysky v. Drake Brothers Co.,* 192 App Div 186, 182 NY Supp 459.)

And in *Klein v. Duchess Sandwich Co.,* 14 Cal 2d 272, 933 P2d 799, 140 ALR 246, under a statute which was identical with ORS 75.150 (1), that Court held that a proper jury question was presented upon evidence that a husband and wife stopped at a restaurant and the husband at the wife's direction procured a ham and cheese sandwich for her, which was wrapped in wax paper and sealed with metal clamps, delivered to the restaurant by the manufacturer about an hour before, upon eating part of which she discovered the presence of maggots and became acutely ill. The Court further held that there was sufficient privity of contract to support

the manufacturer's liability to the ultimate consumer upon the implied warranty as to the fitness of the food, that the statute did not contemplate only the existence of such a warranty running from an immediate seller to an immediate buyer, and that the intervention of a middleman, at least under such close circumstances, made no difference. And as to the contention that recovery was precluded because the wife was not the buyer within the meaning of the statute and that consequently there was no privity of contract between the seller and his wife, the Court observed that although the evidence showed that the wife "sent" the husband for the express purpose of purchasing the sandwich, thereby technically becoming the "buyer" within the terms of the statute, nevertheless no such technical privity of contract as was contended for was necessary in order to enable her to recover as an ultimate consumer, stating that:

> "The warranty as to the fitness of foodstuff for human consumption was not intended to be solely for the immediate 'buyer', but was intended to be for the benefit of the ultimate consumer—the existence of privity of contract not being essential in an action brought by such consumer on the warranty theory. To allow a recovery by such third person, who may have consumed unwholesome food purchased by another, would not impose a greater burden on the manufacturer or on the immediate seller of the food than would be thus imposed if the original purchaser had been injured by reason of the consumption thereof—since the warranty extended to every consumer is that the food is fit for the purpose for which it was intended, namely for human consumption."

It would appear obvious to the appellant that the laws of agency and common sense would require a holding in the instant case that privity, if necessary, has been established between appellant and the appellee.

Point III

Any requirement of notice of breach of warranty under the Uniform Sales Act (ORS 74.490) was satisfied by the appellant.

Barni v. Kutner, 45 Del 550, 76 A2d 801;
Baum v. Murray (1945), 23 Wash 2d 890, 162 P2d 801;
Henderson Tire & Rubber Company v. P. K. Wilson & Son, 235 NY 489, 139 NE 583;
Kennedy v. F. W. Woolworth Co., 205 App Div 648, 200 NYS 121;
Maxwell Co. v. Southern Oregon Gas Corporation, 158 Or 168, 74 P2d 594;
Murphy Laboratories, Inc. v. Emery Industries, Inc., 95 F Supp 651;
Ringstad v. I Magnin & Co. (1952), 39 Wash 2d 923, 239 P2d 848;
Rogiers v. Gilchrist Co., 312 Mass 544, 45 NE 2d 744;
Silverstein v. R. H. Macy & Co. (1943), 266 App Div 5, 40 NYS 2d 916;
Sylvester v. R. H. Macy & Co., 265 App Div 999, 39 NYS 2d 1000;
Texas Motorcoaches v. A. C. F. Motors Co., 154 F2d 91;
Whitfield v. Jessup (1948), 31 Cal 2d 826, 193 P2d 1;
Oregon Revised Statutes 75.690 (1);
Oregon Revised Statutes 75.490;
Williston on Sales, Vol. III, Sec. 484.

ARGUMENT

One of the grounds urged by the appellee in his motion for a directed verdict was that the appellant's cause was fatal because of lack of reasonable notice of breach of warranty (Tr. 85).

Oregon Revised Statutes 75.690(1) provides:

> "Where there is a breach of warranty by the seller, the buyer may, at his election (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty * * * ."

Oregon Revised Statutes 75.490 provides:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore."

The act does not prescribe the form of any notice mentioned therein. *Whitfield v. Jessup* (1948), 31 Cal 2d 826, 193 P2d 1. Any notice required may be oral, *Baum v. Murray* (1945), 23 Wash 2d 890, 162 P2d 801; *Ringstad v. I. Magnin & Co.* (1952), 39 Wash 2d 923, 239 P2d 848. The commencement of the action itself affords sufficient notice of a breach of warranty under the Act. *Silverstein v. R. H. Macy & Co.* (1943), 266 App Div 5, 40 NYS 2d 916.

Likewise, the cases vary as to the substance of any notice required. Such notice should be "clear and unambiguous." *Texas Motorcoaches v. A. C. F. Motors*

Co., 154 F2d 91; it should be "unequivocal." *Murphy Laboratories, Inc. v. Emery Industries, Inc.,* 95 F. Supp 651; it should refer to particular sales and fairly advise the seller of the defects, *Rogiers v. Gilchrist Co.,* 312 Mass 544, 45 NE 2d 744; it should apprise the seller of the fact that the buyer is making a claim for damages or is asserting a violation of its rights, *Whitfield v. Jessup,* supra, *Barni v. Kutner,* 45 Del 550, A2d 801.

The nature of the case and its particular facts and circumstances are important in determining whether any requirement of notice has been satisfied. *Barni v. Kutner,* supra. Appellant contends that the reason for the rule has no application to the facts and circumstances of this case.

In *Silverstein v. R. H. Macy & Co.* (1943), 266 App Div 5, 40 NYS 2d 916, damages were sought for personal injuries sustained as a result of defendant's breach of warranty of a chinning bar and a new trial was ordered after plaintiff appealed from a judgment dismissing his complaint. One of defendant's contentions on appeal was the plaintiff had failed to plead or prove compliance with the Sales Act in respect to giving notice within a reasonable time. The Court held that such requirement had no application to a situation similar to that kind, citing *Kennedy v. F. W. Woolworth Co.,* 205 App Div 648, 200 NYS 121; and *Sylvester v. R. H. Macy & Co., Inc.,* 265 App Div 999, 39 NYS 2d 1000; *also see Maxwell v. Southern Oregon Gas Corporation,* 158 Or 168, 74 P2d 594.

In the *Kennedy* case, supra, damages were sought for injuries occasioned by the eating of candy purchased

from the defendant. That Court held that the complaint was sufficient irrespective of lack of notice; that the notice mentioned in the Sales Act had no relation to goods purchased for immediate human consumption and did not apply to the facts and circumstances of the case. The Court said the section requiring notice is relevant only in situations where there is a sale of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances, which causes money damage to the vendee. (Accord: *Maxwell Co. v. Southern Oregon Gas Corporation,* supra.)

The obvious intent of the Sales Act is to place upon the buyer the duty of inspecting the goods after title and possession has passed to him by his acceptance of them, and to give reasonable notice to the seller of any defect in quality, lack of conformance to sample or failure to comply with description. If such notice is given, the buyer may then return the goods or keep them and bring an action against the seller. Oregon Revised Statutes 75.690.

As stated in Williston on Sales, Vol. III, Sec. 484,

> "A rule seems desirable which is capable of some certainty in its application and also on the one hand avoids the hardship on the buyer of holding that acceptance of delivery and the property in the goods necessarily deprives him of the seller's obligations, and on the other hand avoids the hardship on the seller of allowing a buyer at any time within the period of the statute of limitations to assert that the goods were defective, though no objection was made *when they were received.* With this in

mind the positive requirement of prompt notice was inserted in the statute." (Italics supplied)

Assuming, arguendo, that the statute contemplates notice in all cases, it would seem to follow that such a condition prior to action was excused in the present case and that the commencement of the action was sufficient notice because the law does not require something to be done for the mere form of it. If a notice were to be given, it was for the purpose of enabling the person to whom it was given to act. *Henderson Tire & Rubber Company v. P. K. Wilson & Son,* 235 NY 489, 139 NE 583.

The appellant had no information which he could have given the respondent by notice that would enable the latter to act. The shirt was destroyed (Tr. 45). It was a cash sale (Tr. 45). The exact date of purchase was unknown (Tr. 39). Appellant wasn't even certain of the price paid for the garment, or of the trade name (Tr. 40, 41, 46, 64). Appellant was not certain whether the shirt had two or three buttons down the front (Tr. 65). About all that the appellant could have told the seller was that he purchased a pink, cotton shirt, sometime in May, and that it had a polished finish. Naturally, the seller's most logical step would then be to determine if the garment or any part of it were still in existence so that it could be identified and tested. This inquiry would have received a negative reply and, considering the number of transactions the appellee undoubtedly made within this same period of time and within the same price range, identification would have been impossible.

For the foregoing reasons, appellant submits that the complaint was sufficient notwithstanding the failure to plead or prove any notice.

Point IV

The appellee waived any requirement of notice of breach of warranty that may be required under the Uniform Sales Act (ORS 75.490).

Fowler v. Crown-Zellerbach Corporation, CCA Or 1947, 163 F2d 773;

Owen v. Schwartz, CA 1949, 177 F2d 641, 85 US App DC 302;

Washington v. General Motors Acceptance Corporation, DC Fla 1956, 19 FRD 370;

Federal Rules of Civil Procedure, Rule 16;

Rules, United States District Court for District of Oregon, Effective June 20, 1958.

ARGUMENT

The Rules of the United States District Court for the District of Oregon, effective June 30, 1958, with Revisions to July 31, 1958, provide in part:

"Rule 34

Pretrial Conferences

(a) At least one pretrial conference, pursuant to Rule 16 Federal Rules of Civil Procedure, shall be held in every civil case unless the Court orders otherwise.

(b) When the parties so agree, with the approval of the Court, the pretrial order may supercede the pleadings, and in that event the pleadings go out of the case. Otherwise, the pretrial order shall be supplemental to the pleadings."

Rule 16 of the Federal Rules of Civil Procedure contemplate that when the parties have limited their contentions and issues to be decided in a pretrial order and the same has been approved by the Court that they are confined to those issues during trial, unless modified to prevent manifest injustice. *Owen v. Schwartz,* CA 1949, 177 F2d 641, 85 US App DC 302; *Washington v. General Motors Acceptance Corporation,* DC Fla 1956, 19 FRD 370.

The pre-trial order which was approved by the Court and entered sets forth the issues to be determined at the trial (pp. 9, 10, Transcript of Record) as follows:

"1. Did plaintiff purchase a shirt from the defendant?

2. If so, was the shirt which plaintiff purchased of highly flammable type and by reason thereof, not fit for use as wearing apparel?

3. Did the defendant breach its warranty of fitness for purpose?

4. Did plaintiff receive injuries as a direct and proximate result of defendant's breach of warranty?

5. If so, what is the amount of plaintiff's damages?"

It is clear that the parties intended to be limited to their contentions and the issues as set forth in the pretrial order (Tr. 67, 68), and the appellee was, therefore, foreclosed from asserting as a ground for a directed verdict the failure of plaintiff to plead or prove notice. Nor can respondent assert it before this Court. *Fowler v. Crown-Zellerbach Corporation,* CCA Or 1947, 163 F2d 773.

CONCLUSION

It is submitted that the trial Court erred in finding that a jury question was not presented as to the fitness of the garment sold as demonstrated under Point I, and that it also erred in refusing the plaintiff a new trial as demonstrated under Points II, III and IV.

Respectfully submitted,

NICHOLAS GRANET